

## 2009 DRAFTING REQUEST

### Bill

Received: **11/20/2008**

Received By: **gmalaise**

Wanted: **As time permits**

Identical to LRB:

For: **John Lehman (608) 266-1832**

By/Representing: **Mike Browne**

This file may be shown to any legislator: **NO**

Drafter: **gmalaise**

May Contact:

Addl. Drafters:

Subject: **Employ Priv - wage claims**

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Lehman@legis.wisconsin.gov**

Carbon copy (CC:) to:

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### Pre Topic:

No specific pre topic given

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### Topic:

Wage claim lien priority

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### Instructions:

See attached--redraft 2007 SB 123 but also: 1) include priority over bona fide purchasers in backruptcy; and 2) permit union to file claim on behalf of worker

---

### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	gmalaise 11/21/2008	kfollett 12/05/2008		_____			State
/1			mduchek 12/05/2008	_____	mbarman 12/05/2008		State
/2	gmalaise 12/10/2008	kfollett 12/10/2008	phenry 12/10/2008	_____	mbarman 12/10/2008	cduerst 01/05/2009	

FE Sent For: "1/2" @ intro. 1/8/09 <END>

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/1		12/gjf 12/10	mduchek 12/05/2008	by/10 ph	mbarman 12/05/2008		

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1/?	gmalaise	11/15 12/5	MD 12/5	MD 12/5			
FE Sent For:			12/5				

<END>

## Malaise, Gordon

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**From:** Browne, Michael  
**Sent:** Tuesday, November 18, 2008 4:24 PM  
**To:** Malaise, Gordon  
**Subject:** modifications to 07 sb 123

Gordon –

Sen. Lehman would like to request the following changes to the re-draft of 2007 SB 123:

1. Add language to address an issue raised by the decision of the 7<sup>th</sup> Circuit Court of Appeals decision holding the Wisconsin wage lien law does not apply in bankruptcy cases because the legislature did not specify a bona fide purchaser is covered by the law. (I only have hard copy of decision and a suggestion on language so I will have that brought over to you.)
2. Allow a union to file a wage claim on an employee/member's behalf

Thanks for your help, please let me know if there are any questions or you need additional information on these items.

Mike Browne  
Office of Senator John Lehman  
310 South, State Capitol  
(608) 266-1832  
michael.browne@legis.wisconsin.gov

**RELEVANT LANGUAGE FROM**  
**IN RE: GLOBE BUILDING MATERIALS, INC., 463 F.3d 631 (7 Cir 2006)**

The express statutory language states that the lien "takes precedence over all other debts, judgments, decrees, liens or mortgages against the employer, except a lien of a financial institution . . . ." Wis. Stat. 109.09(1)(c). The bona fide purchaser is conspicuously absent from this list. By specifying with such precision the claims over which the lien takes precedence, the Wisconsin legislature implicitly established the outer boundaries of Wis. Stat. 109.09.

*Id.* at 634-635

...

Should the State feel this holding does not reflect their intended meaning of Wis. Stat. 109.09, the legislature need only amend the statutory language to provide for the lien's express precedence over the rights of bona fide purchasers in addition to "all other debts, judgments, decrees, liens, or mortgages . . . ."

*Id.* 635

under 11 USC 545(2),  
**PROPOSED AMENDMENT**

rights,  
1m. A lien under par. (a) takes precedence over the rights of any purchaser <sup>of the any property of the employer</sup> including any bona fide purchaser and all other debts, judgments, decrees, liens, or mortgages against the employer, except a lien of a commercial lending institution as provided in subd. 2. and 3. or a lien under s. 292.31 (8) (i) or 292.81, regardless of whether those other debts, judgments, decrees, liens, or mortgages originate before or after the lien under par. (a) takes effect. A lien under par. (a) may be enforced in the manner provided in ss. 779.09 to 779.12, 779.20, and 779.21, insofar as those provisions are applicable. The lien ceases to exist if the department of workforce development or the employee does not bring an action to enforce the lien within the period prescribed in s. 893.44 for the underlying wage claim.



In the  
United States Court of Appeals  
For the Seventh Circuit

---

No. 05-3738

IN RE:

GLOBE BUILDING MATERIALS, INCORPORATED,

*Debtor.*

APPEAL OF:

STATE OF WISCONSIN AND PEGGY LAUTENSCHLAGER

---

Appeal from the United States District Court  
for the Northern District of Indiana, Hammond Division.  
No. 04 C 481—Rudy Lozano, Judge.

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ARGUED MAY 10, 2006—DECIDED SEPTEMBER 8, 2006

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Before FLAUM, *Chief Judge*, and BAUER and EVANS,  
*Circuit Judges*.

BAUER, *Circuit Judge*. After an unsuccessful attempt to restructure, Globe Building Materials, Incorporated (Globe) was liquidated under Chapter 7 of the Bankruptcy Code. Peggy Lautenschlager, the Attorney General for the State of Wisconsin, sought to recover wages owed to former Globe employees in her state through a statutory lien. The trustee brought this adversary proceeding, and argued that the lien was avoidable under 11 U.S.C. § 545(2). Both the bankruptcy and district courts found for the trustee. We affirm.

The facts of this case are not in dispute. On January 19, 2001, Globe filed a voluntary petition for relief under

Chapter 11 of the Bankruptcy Code. Before ceasing operations, Globe manufactured, sold, and distributed residential roofing materials. The company's primary assets consisted of three manufacturing plants (one located in Wisconsin), machinery, equipment, inventory, and receivables. On April 4, 2001, the case was converted to Chapter 7, and Gordon E. Gouveia was appointed Trustee for the Debtor's estate.

On or about July 24, 2001, the State of Wisconsin's (the State) Department of Workforce Development filed a Notice of Lien with the State Department of Financial Institutions and the Office of the Chippewa Wisconsin County Clerk. The State asserted a wage lien under Wis. Stat. 109.09(2) against all real and personal property then owned or thereafter acquired by Globe within its boundaries. The lien was properly perfected by its filing.

Around February 22, 2002, the bankruptcy court approved the trustee's sale of Globe's Wisconsin manufacturing facility. The proceeds of the sale were paid to the trustee. On the basis of Wis. Stat. 109.09, the State claimed a first priority lien on the net sale proceeds. On January 17, 2003, the trustee brought this adversary proceeding to set aside the wage lien.

On September 13, 2004, the bankruptcy court found that there was no genuine issue of material fact and granted summary judgment to the trustee. The bankruptcy court held that 11 U.S.C. § 545(2) allowed the trustee to avoid the wage lien because Wis. Stat. 109.09 delineates the conditions under which the lien takes precedence, and the statutory language does not account for the trustee's hypothetical bona fide purchaser status. The district court affirmed, and this appeal followed. Both parties agree that this discrete legal issue represents the entirety of the case.

We review the decisions of the bankruptcy and district court to grant summary judgment on this matter *de novo*.

*In re AR Accessories Group, Inc.*, 345 F.3d 454, 457 (7th Cir. 2003).

Whether 11 U.S.C. § 545(2) allows the trustee to avoid the State's wage lien turns on the construction and interaction of three separate statutory sections. Sections 545 and 546 of the Bankruptcy Code set forth the extent of the trustee's power to avoid statutory liens. The relevant language of § 545(2) provides:

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—

...

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.

But this power is not absolute, 11 U.S.C. § 546 states, in relevant part:

(b)(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection[:]

The question before us, then, is whether Wis. Stat. 109.09 is such a "generally applicable law," and if so, how is it applied? The statutory language provides that:

(1) The department shall investigate and attempt equitably to adjust controversies between employers and employees as to alleged wage claims . . . .

(2)(a) The department of workforce development, under its authority under sub. (1) to maintain actions for the

benefit of employees, or an employee who brings an action under s. 109.03 (5) shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency.

...

(c) A lien under par. (a) takes precedence over all other debts, judgments, decrees, liens or mortgages against the employer, except a lien of a financial institution, as defined in s. 69.30(1)(b), that originates before the lien under par. (a) takes effect or a lien under s. 292.31(8)(I) or 292.81 . . . .

(Emphasis added.)

At the outset, we must dispose of the State's preliminary argument that the absence of an actual bona fide purchaser has some bearing on this matter. The express purpose of the § 545(2) language is not to affirm the rights of an actual bona fide purchaser, but to vest the trustee with those rights were such an entity to exist. This is a simple, but possibly deceptive, statutory mechanism designed to access a legal concept without establishing the traditional elements necessary to do so. The trustee's hypothetical status is therefore of no dispositive value to our analysis.

Turning back to the interaction of these three statutory subsections, we consider first the State's argument. The Attorney General submits that Wisconsin's wage lien statute "[meets] the requirements" of § 546(b)(1)(A), and thus completely forecloses all of the trustee's powers under §§ 544, 545, and 549, specifically those as a bona fide purchaser. To support this claim, the State relies heavily on our holding in *AR Accessories*, 345 F.3d at 454.

In *AR Accessories*, we addressed the initial question of whether a Wis. Stat. 109.09 wage lien was void *ab initio* when created after the debtor had filed its petition for

bankruptcy. 345 F.3d at 456. We held that a priming statute, such as 109.09, “need not contain language expressly providing for retroactive perfection in order to trigger the exception provided in 11 U.S.C. § 546(b)(1)(A) to the automatic stay of postpetition efforts to protect a property interest.” *Id.* at 458. Thus, the wage lien did not violate the Bankruptcy Code’s automatic stay, and was generally valid. Additionally, in rejecting an alternative argument, we noted that the Wis. Stat. 109.09 lien interest was created when the last services were rendered for which wages went unpaid. *Id.* at 459. We agreed with the bankruptcy court that the Department’s filing did not create a new interest under § 546(b), it merely put other claimants on notice of the pre-existing claim. But this analysis was the extent of our Wis. Stat. 109.09 review. *AR Accessories* did not address, as we do today, the internal operation of the Wisconsin statute and its interaction with the various powers of the trustee. This is because the debtor there did not assert that the wage lien could have been avoided under §§ 544 or 545, a legal question distinct from whether the lien’s prescribed operation was generally void. The challenge in *AR Accessories* was primarily facial, and, as such, our review was, too.

Despite having acknowledged these legal and factual differences, the State argues here that our analysis in *AR Accessories* informs and controls the instant matter. This argument turns on a broad interpretation of the § 546(b)(1) language that subjects the trustee’s power to “any generally applicable law. . . .” Specifically, the State claims that because we held Wis. Stat. 109.09 generally applies under § 546(b)(1)(A), the wage lien automatically forecloses all of the trustee’s powers under §§ 544, 545, and 549. But this interpretation reads § 546(b)(1)(A) as if the wage lien itself was the direct object of the “subject to” language, and turns a blind eye to the internal structure of Wis. Stat. 109.09.

In drafting §§ 545(2) and 546(b)(1)(A) as it did, Congress largely left the avoidability of statutory liens to state law. See *Stanford v. Butler (In re Stanford)*, 826 F.2d 353, 355-56 (5th Cir. 1987). Where the applicable state statute permits the lien in question to defeat the rights of a bona fide purchaser, the Bankruptcy Code will adopt that state policy choice and grant secured status to the lien. *Limperis v. First Nat'l Bank of Geneva (In re Phillips Constr. Co., Inc.)*, 579 F.2d 431, 432 (7th Cir. 1978). Further, where the state law denies enforcement of a statutory lien against a bona fide purchaser, the lien is avoidable pursuant to § 545(2). See *El Paso v. Am. W. Airlines, Inc. (In re Am. W. Airlines, Inc.)*, 217 F.3d 1161, 1164 (9th Cir. 2000); *City of Boerne v. Boerne Hills Leasing Corp. (In re Boerne Hills Leasing Corp.)*, 15 F.3d 57, 59 (5th Cir. 1994). We must, therefore, examine Wis. Stat. 109.09 to determine if the Wisconsin legislature intended for the wage lien to defeat the rights of a bona fide purchaser.

Our analysis of the wage lien statute's interaction with § 546 is a two-step process, and tracks the analysis conducted by both the bankruptcy and district courts.

First, is the statutory lien protected under nonbankruptcy law against . . . a bona fide purchaser under Code § 545 . . . arising as of the date of the filing of the bankruptcy petition? If the answer is "yes," the analysis need proceed no further. Unless avoided as a disguised priority or a landlord's lien under Code § 545, the statutory lien is valid in bankruptcy . . . . If the answer to . . . this first question is "no," then a second question must be asked. Under applicable nonbankruptcy law, does there remain a procedure by which the statutory lien claimant can still perfect the lien as against . . . bona fide purchasers whose interest arose as of the date of bankruptcy? If such a procedure exists and applies to the type of claimant against whom the statutory lien

was not previously protected, the holder of the statutory lien may still protect his interest.

2 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW & PRACTICE 2d § 55:3 (2003).

Upon subjecting Wis. Stat. 109.09 to this analysis, we hold that the State's argument fails. The express statutory language states that the lien "takes precedence over all other debts, judgments, decrees, liens or mortgages against the employer, except a lien of a financial institution . . . ." Wis. Stat. 109.09(1)(c). The bona fide purchaser is conspicuously absent from this list. By specifying with such precision the claims over which the lien takes precedence, the Wisconsin legislature implicitly established the outer boundaries of Wis. Stat. 109.09. This is a straightforward application of the concept *expressio unius est exclusio alterius*, "to express or include the one thing implies the exclusion of the other . . . ." BLACK'S LAW DICTIONARY 620 (8th ed. 2004); see also *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 861 (7th Cir. 2002) (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)). In interpreting the statute we will not invent missing language. *In re Kmart Corp.*, 359 F.3d 866, 869 (7th Cir. 2004).

The State, however, argues that because the lien interest was created on the last date unpaid services were rendered, it defeats a bona fide purchaser under nonbankruptcy law. Again, its sole support for this argument is our reasoning in *AR Accessories*. But as we noted above, the ultimate issue before this court in *AR Accessories* was whether Wis. Stat. 109.09 violated the Bankruptcy Code's automatic stay. Our adoption of the statute's implied retroactive perfection was limited to that single legal question. We did not, as we have today, examine the specific workings of the statute itself. And nothing within Wis. Stat. 109.09 expressly provides for the wage lien's retroactive perfection or makes it enforceable against the rights of a bona fide purchaser under § 545(2).

Should the State feel this holding does not reflect their intended meaning of Wis. Stat. 109.09, the legislature need only amend the statutory language to provide for the lien's express precedence over the rights of bona fide purchasers in addition to "all other debts, judgments, decrees, liens, or mortgages . . . ."

For the abovementioned reasons, the decision of the district court is AFFIRMED.

A true Copy:

Teste:

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*Clerk of the United States Court of  
Appeals for the Seventh Circuit*



2007 SENATE BILL 123

March 30, 2007 - Introduced by Senators LEHMAN, HANSEN, DECKER, BRESKE and KREITLOW, cosponsored by Representatives GARTHWAITE, SHERIDAN, BLACK, SINICKI, MASON, JORGENSEN, KREUSER, ZEPNICK, TURNER and CULLEN. Referred to Committee on Veterans and Military Affairs, Biotechnology and Financial Institutions.

the filing of a wage claim or the bringing of a wage claim action by a collective bargaining representative on representative on behalf of an employee and


- 1 AN ACT *to repeal* 109.09 (2) (c) 1., 109.09 (2) (c) 2. and 109.09 (2) (c) 3., and *to*
- 2 *renumber and amend* 109.09 (2) (c) 1m. of the statutes; **relating to:** the
- 3 priority of a wage claim lien over a prior lien of a commercial lending
- 4 institution *and over the rights of a purchaser of any property of the employer*


**Analysis by the Legislative Reference Bureau**

Under current law, the Department of Workforce Development (DWD) must investigate and attempt to adjust any claim by an employee that his or her employer has not paid the employee any wages that are owed to the employee (wage claim). Currently, DWD or an employee who brings a wage claim action has a lien upon all property of the employer, real and personal, located in this state for the full amount of any wages owed to the employee (wage claim lien). Currently, a wage claim lien takes precedence over all other debts, judgments, decrees, liens, or mortgages against an employer, except for a lien of a commercial lending institution that originates before the wage claim lien takes effect (prior lien), regardless of whether those other debts, judgments, decrees, liens, or mortgages originated before or after the wage claim lien takes effect. Current law provides, however, that a wage claim lien takes precedence over a prior lien of a commercial lending institution as to the first \$3,000 of unpaid wages covered under the wage claim lien that are earned within the six months preceding the filing of the wage claim with DWD or the commencement of an action by the employee to recover the wages due.

This bill eliminates that \$3,000 cap and six-month time limit so that under the bill a wage claim lien covering any amount of wages earned at any time takes

**SENATE BILL 123**

 precedence over a lien of a commercial lending institution, regardless of whether the lien of the commercial lending institution originated before or after the wage claim lien takes effect.

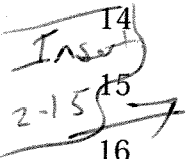
 *The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

*the rights of any purchaser of any property of the employer, including any bona fide purchaser of under 11 USC 545 (2), and over*

1        **SECTION 1.** 109.09 (2) (c) 1. of the statutes is repealed.



2        **SECTION 2.** 109.09 (2) (c) 1m. of the statutes is renumbered 109.09 (2) (c) and  
3 amended to read:

4        109.09 (2) (c) A lien under par. (a) takes precedence over all other debts,  
5 judgments, decrees, liens, or mortgages against the employer, except ~~a lien of a~~  
6 ~~commercial lending institution as provided in subd. 2. and 3. or a lien under s. 292.31~~  
7 (8) (i) or 292.81, regardless of whether those other debts, judgments, decrees, liens,  
8 or mortgages originate before or after the lien under par. (a) takes effect. A lien under  
9 par. (a) may be enforced in the manner provided in ss. 779.09 to 779.12, 779.20, and  
10 779.21, insofar as those provisions are applicable. The lien ceases to exist if the  
11 department of workforce development or the employee does not bring an action to  
12 enforce the lien within the period prescribed in s. 893.44 for the underlying wage  
13 claim.

 14        **SECTION 3.** 109.09 (2) (c) 2. of the statutes is repealed.

15        **SECTION 4.** 109.09 (2) (c) 3. of the statutes is repealed.

16        **SECTION 5. Nonstatutory provisions.**

 17        (1) **WAGE CLAIM LIENS.** Notwithstanding section 109.09 (2) (c), ~~2005~~  stats., a lien  
18 that exists under section 109.09 (2) (a) of the statutes on the day before the effective  
19 date of this subsection takes precedence over a lien of a commercial lending

**SENATE BILL 123**

2007

1 institution, as defined in section 109.09 (2) (c) 1., 2005 stats., that originated before  
2 the lien under section 109.09 (2) (a) of the statutes took effect.

3 (END)

**2009-2010 DRAFTING INSERT**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-0882/lins  
GMM.....

(INSERT 2-1)

✓

1       **SECTION 1.** 109.03 (5) of the statutes is amended to read:

2       109.03 (5) ENFORCEMENT. Except as provided in sub. (1), no employer may by  
3       special contract with employees or by any other means secure exemption from this  
4       section. Each employee shall have a right of action against any employer for the full  
5       amount of the employee's wages due on each regular pay day as provided in this  
6       section and for increased wages as provided in s. 109.11 (2), in any court of competent  
7       jurisdiction. An employee may bring a wage claim under this subsection on his or  
8       her own behalf or, if authorized in writing by an employee, the recognized or certified  
9       collective bargaining representative of the employee may bring an action against an  
10      employer under this subsection on behalf of the employee. An employee or collective  
11      bargaining representative may bring an action against an employer under this  
12      subsection without first filing a wage claim with the department under s. 109.09 (1).  
13      An employee who or collective bargaining representative that brings an action  
14      against an employer under this subsection shall have a lien upon all property of the  
15      employer, real or personal, located in this state as described in s. 109.09 (2).

✓

16      History: 1975 c. 380, 421; 1977 c. 26, 235, 447; 1981 c. 20, 388; 1987 a. 403; 1989 a. 226, 228; 1993 a. 86, 144; 2001 a. 102, 103; 2007 a. 7, 195.

16      **SECTION 2.** 109.03 (6) of the statutes is amended to read:

17      109.03 (6) WAGE CLAIM. In an action by an employee, a collective bargaining  
18      representative, or the department against the employer on a wage claim, no security  
19      for payment of costs is required. In any such proceeding the court may allow the  
20      prevailing party, in addition to all other costs, a reasonable sum for expenses. No  
21      person other than an employee, a collective bargaining representative, or the  
22      department shall be benefited or otherwise affected by this subsection.

✓

23      History: 1975 c. 380, 421; 1977 c. 26, 235, 447; 1981 c. 20, 388; 1987 a. 403; 1989 a. 226, 228; 1993 a. 86, 144; 2001 a. 102, 103; 2007 a. 7, 195.

23      **SECTION 3.** 109.09 (2) (a) of the statutes is amended to read:

1           109.09 (2) (a) The department of workforce development, under its authority  
2           under sub. (1) to maintain actions for the benefit of employees, or an employee who  
3           brings an action under s. 109.03 (5), or the recognized or certified collective  
4           bargaining representative of an employee, under its authority under s. 109.03 (5) to  
5           maintain actions for the benefit of employees, shall have a lien upon all property of  
6           the employer, real or personal, located in this state for the full amount of any wage  
7           claim or wage deficiency.

History: 1975 c. 380; 1979 c. 32 s. 92 (9); 1985 a. 29, 220; 1989 a. 113; 1991 a. 146; 1993 a. 86, 453; 1995 a. 227; 1997 a. 27, 237; 1999 a. 9; 1999 a. 150 s. 672; 1999 a. 167; 2001 a. 10; 2003 a. 63; 2005 a. 434.

8           **SECTION 4.** 109.09 (2) (b) 1. of the statutes is amended to read:

9           109.09 (2) (b) 1. A lien under par. (a) upon real property takes effect when the  
10          department of workforce development or, employee, or collective bargaining  
11          representative files a notice of the lien with the clerk of the circuit court of the county  
12          in which the services or some part of the services were performed, pays the fee  
13          specified in s. 814.61 (5) to that clerk of circuit court, and serves a copy of that petition  
14          on the employer by personal service in the same manner as a summons is served  
15          under s. 801.11 or by certified mail with a return receipt requested. The clerk of  
16          circuit court shall enter the notice of the lien on the judgment and lien docket kept  
17          under s. 779.07.

History: 1975 c. 380; 1979 c. 32 s. 92 (9); 1985 a. 29, 220; 1989 a. 113; 1991 a. 146; 1993 a. 86, 453; 1995 a. 227; 1997 a. 27, 237; 1999 a. 9; 1999 a. 150 s. 672; 1999 a. 167; 2001 a. 10; 2003 a. 63; 2005 a. 434.

18          **SECTION 5.** 109.09 (2) (b) 2. of the statutes is amended to read:

19          109.09 (2) (b) 2. A lien under par. (a) upon personal property takes effect when  
20          the department of workforce development or, employee, or collective bargaining  
21          representative files notice of the lien in the same manner, form, and place as  
22          financing statements are filed under subch. V of ch. 409 regarding debtors who are  
23          located in this state, pays the same fee provided in s. 409.525 for filing financing

1 statements, and serves a copy of the notice on the employer by personal service in the  
2 same manner as a summons is served under s. 801.11 or by certified mail with a  
3 return receipt requested. The department of financial institutions shall place the  
4 notice of the lien in the same file as financing statements are filed under subch. V  
5 of ch. 409.

**History:** 1975 c. 380; 1979 c. 32 s. 92 (9); 1985 a. 29, 220; 1989 a. 113; 1991 a. 146; 1993 a. 86, 453; 1995 a. 227; 1997 a. 27, 237; 1999 a. 9; 1999 a. 150 s. 672; 1999 a. 167; 2001 a. 10; 2003 a. 63; 2005 a. 434.

6 **SECTION 6.** 109.09 (2) (b) 3. of the statutes is amended to read:

7 109.09 (2) (b) 3. The department of workforce development ~~or~~ employee, or  
8 collective bargaining representative must file the notice under subd. 1. or 2. within  
9 2 years after the date on which the wages were due. The notice shall specify the  
10 nature of the claim and the amount claimed, describe the property upon which the  
11 claim is made, and state that the person filing the notice claims a lien on that  
12 property.

**History:** 1975 c. 380; 1979 c. 32 s. 92 (9); 1985 a. 29, 220; 1989 a. 113; 1991 a. 146; 1993 a. 86, 453; 1995 a. 227; 1997 a. 27, 237; 1999 a. 9; 1999 a. 150 s. 672; 1999 a. 167; 2001 a. 10; 2003 a. 63; 2005 a. 434.

13 **SECTION 7.** 109.09 (1) of the statutes is amended to read:

14 109.09 (1) The department shall investigate and attempt equitably to adjust  
15 controversies between employers and employees as to alleged wage claims. An  
16 employee may file a wage claim under this subsection on his or her own behalf or, if  
17 authorized in writing by an employee, the recognized or certified collective  
18 bargaining representative of the employee may file a wage claim under this  
19 subsection on behalf of the employee. The department may receive and investigate  
20 any wage claim which is filed with the department, or received by the department  
21 under s. 109.10 (4), no later than 2 years after the date the wages are due. The  
22 department may, after receiving a wage claim, investigate any wages due from the  
23 employer against whom the claim is filed to any employee during the period

out of  
order  
Sort

1 commencing 2 years before the date the claim is filed. The department shall enforce  
2 this chapter and ss. 66.0903, 103.02, 103.49, 103.82, 104.12 and 229.8275. In  
3 pursuance of this duty, the department may sue the employer on behalf of the  
4 employee to collect any wage claim or wage deficiency and ss. 109.03 (6) and 109.11  
5 (2) and (3) shall apply to such actions. Except for actions under s. 109.10, the  
6 department may refer such an action to the district attorney of the county in which  
7 the violation occurs for prosecution and collection and the district attorney shall  
8 commence an action in the circuit court having appropriate jurisdiction. Any  
9 number of wage claims or wage deficiencies against the same employer may be joined  
10 in a single proceeding, but the court may order separate trials or hearings. In actions  
11 that are referred to a district attorney under this subsection, any taxable costs  
12 recovered by the district attorney shall be paid into the general fund of the county  
13 in which the violation occurs and used by that county to meet its financial  
14 responsibility under s. 978.13 (2) (b) for the operation of the office of the district  
15 attorney who prosecuted the action.

**History:** 1975 c. 380; 1979 c. 32 s. 92 (9); 1985 a. 29, 220; 1989 a. 113; 1991 a. 146; 1993 a. 86, 453; 1995 a. 227; 1997 a. 27, 237; 1999 a. 9; 1999 a. 150 s. 672; 1999 a. 167; 2001 a. 10; 2003 a. 63; 2005 a. 434.

(END OF INSERT)

(INSERT 2-15)

✓  
16 **SECTION 8.** 109.11 (2) (a) of the statutes is amended to read:

17 109.11 (2) (a) In a wage claim action that is commenced by an employee before  
18 the department has completed its investigation under s. 109.09 (1) and its attempts  
19 to compromise and settle the wage claim under sub. (1), a circuit court may order the  
20 employer to pay to the employee, in addition to the amount of wages due and unpaid

- 1 and in addition to or in lieu of the criminal penalties specified in sub. (3), increased
- 2 wages of not more than 50% of the amount of wages due and unpaid.

History: 1975 c. 380, 421; 1977 c. 26; 1993 a. 86.

(END OF INSERT)

(INSERT A)

The bill also provides that a wage claim lien takes precedence over the rights of any purchaser of any property of the employer, including any bona fide purchaser that purchases the property of the employer at the time of commencement of a bankruptcy proceeding, that is, the trustee in bankruptcy. This change reverses *In Re Globe Building Materials, Inc.*, 463 F. 3d 631 (7th Cir. 2006), which held that the trustee in bankruptcy could avoid a wage claim lien because under the current wage claim lien law a wage claim does not expressly take precedence over the rights of a bona fide purchaser under the federal bankruptcy law.

Finally, the bill permits a recognized or certified collective bargaining representative of an employee to file a wage claim with DWD, or <sup>to</sup> bring a wage claim action in court, on behalf of an employee and grants a wage claim lien to a collective bargaining representative that brings a wage claim action.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

(END OF INSERT)



## Malaise, Gordon

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**From:** Malaise, Gordon  
**Sent:** Wednesday, December 10, 2008 1:18 PM  
**To:** Browne, Michael  
**Subject:** RE: additional wage lien concern (lrb 0882/1)

Mike:

No, I don't think that there is a legal requirement that a union receive permission prior to pursuing an employee's wage claim. I used as a template s. 103.13 (3), which permits an employee to designate a union representative to inspect the employee's personnel records, but that is different in that it involves confidential personnel records.

So I will go ahead and make the change.

Gordon

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**From:** Browne, Michael  
**Sent:** Wednesday, December 10, 2008 1:11 PM  
**To:** Malaise, Gordon  
**Subject:** additional wage lien concern (lrb 0882/1)

Gordon —

An issue has been raised regarding the requirement in LRB 0882/1 that written employee certification must be obtained before a collective bargaining representative could initiate a wage lien claim on the employee's behalf.

The idea behind allowing a union to initiate proceedings was to try to address the logistical challenges of tracking down a scattered workforce subsequent to a business' bankruptcy/closing. Eliminating the 6 month time limit for filing can alleviate some of this concern but requiring written permission from employees still creates challenges. Labor argues that a labor organizations filing of a wage lien is analogous to the filing of a grievance for violations of a contract — an action that does not require explicit written authorization by an employee.

Is there some other existing law that would require a union to receive written permission prior to pursuing a wage claim on an employee's behalf? If not could we eliminate? (Looks like it is page 2, line 8, and also on page 3, lines 18-19). Please give me call if you've got any questions or if there's a more complicated policy issue at work here.

Thanks.

Mike Browne  
Office of Senator John Lehman  
310 South, State Capitol  
(608) 266-1832  
[michael.browne@legis.wisconsin.gov](mailto:michael.browne@legis.wisconsin.gov)

STATE OF WISCONSIN - LEGISLATIVE REFERENCE BUREAU

LRB

Research (608-266-0341)

Library (608-266-7040)

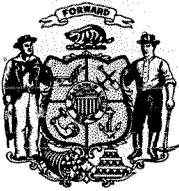
Legal (608-266-3561)

LRB

12

p 6, p 14-15

Insert reference to "collective bargaining representative"



State of Wisconsin  
2009 - 2010 LEGISLATURE

LRB-0882/1

GMM:kjf:md

LN 12/10

2009 BILL

Soon

cp 6 & 11

Regen

1 AN ACT *to repeal* 109.09 (2) (c) 1., 109.09 (2) (c) 2. and 109.09 (2) (c) 3.; *to*  
2 *renumber and amend* 109.09 (2) (c) 1m.; and *to amend* 109.03 (5), 109.03 (6),  
3 109.09 (1), 109.09 (2) (a), 109.09 (2) (b) 1., 109.09 (2) (b) 2., 109.09 (2) (b) 3. and  
4 109.11 (2) (a) of the statutes; **relating to:** the filing of a wage claim or the  
5 bringing of a wage claim action by a collective bargaining representative on  
6 behalf of an employee and the priority of a wage claim lien over a prior lien of  
7 a commercial lending institution and over the rights of a purchaser of any  
8 property of the employer.

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***Analysis by the Legislative Reference Bureau***

Under current law, the Department of Workforce Development (DWD) must investigate and attempt to adjust any claim by an employee that his or her employer has not paid the employee any wages that are owed to the employee (wage claim). Currently, DWD or an employee who brings a wage claim action has a lien upon all property of the employer, real and personal, located in this state for the full amount of any wages owed to the employee (wage claim lien). Currently, a wage claim lien takes precedence over all other debts, judgments, decrees, liens, or mortgages against an employer, except for a lien of a commercial lending institution that originates before the wage claim lien takes effect (prior lien), regardless of whether

**BILL**

those other debts, judgments, decrees, liens, or mortgages originated before or after the wage claim lien takes effect. Current law provides, however, that a wage claim lien takes precedence over a prior lien of a commercial lending institution as to the first \$3,000 of unpaid wages covered under the wage claim lien that are earned within the six months preceding the filing of the wage claim with DWD or the commencement of an action by the employee to recover the wages due.

This bill eliminates that \$3,000 cap and six-month time limit so that under the bill a wage claim lien covering any amount of wages earned at any time takes precedence over a lien of a commercial lending institution, regardless of whether the lien of the commercial lending institution originated before or after the wage claim lien takes effect.

The bill also provides that a wage claim lien takes precedence over the rights of any purchaser of any property of the employer, including any bona fide purchaser that purchases the property of the employer at the time of commencement of a bankruptcy proceeding, that is, the trustee in bankruptcy. This change reverses *In Re Globe Building Materials, Inc.*, 463 F. 3d 631 (7th Cir. 2006), which held that the trustee in bankruptcy could avoid a wage claim lien because under the current wage claim lien law a wage claim does not expressly take precedence over the rights of a bona fide purchaser under the federal bankruptcy law.

Finally, the bill permits a recognized or certified collective bargaining representative of an employee to file a wage claim with DWD, or to bring a wage claim action in court, on behalf of an employee and grants a wage claim lien to a collective bargaining representative that brings a wage claim action.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1       **SECTION 1.** 109.03 (5) of the statutes is amended to read:

2       109.03 (5) ENFORCEMENT. Except as provided in sub. (1), no employer may by  
3       special contract with employees or by any other means secure exemption from this  
4       section. Each employee shall have a right of action against any employer for the full  
5       amount of the employee's wages due on each regular pay day as provided in this  
6       section and for increased wages as provided in s. 109.11 (2), in any court of competent  
7       jurisdiction. An employee may bring a wage claim under this subsection on his or  
8       her own behalf or, if authorized in writing by an employee, the recognized or certified

**BILL**

1 collective bargaining representative of the employee may bring an action against an  
2 employer under this subsection on behalf of the employee. An employee or collective  
3 bargaining representative may bring an action against an employer under this  
4 subsection without first filing a wage claim with the department under s. 109.09 (1).  
5 An employee ~~who~~ or collective bargaining representative that brings an action  
6 against an employer under this subsection shall have a lien upon all property of the  
7 employer, real or personal, located in this state as described in s. 109.09 (2).

8 **SECTION 2.** 109.03 (6) of the statutes is amended to read:

9 109.03 (6) WAGE CLAIM. In an action by an employee, a collective bargaining  
10 representative, or the department against the employer on a wage claim, no security  
11 for payment of costs is required. In any such proceeding the court may allow the  
12 prevailing party, in addition to all other costs, a reasonable sum for expenses. No  
13 person other than an employee, a collective bargaining representative, or the  
14 department shall be benefited or otherwise affected by this subsection.

15 **SECTION 3.** 109.09 (1) of the statutes is amended to read:

16 109.09 (1) The department shall investigate and attempt equitably to adjust  
17 controversies between employers and employees as to alleged wage claims. An  
18 employee may file a wage claim under this subsection on his or her own behalf or, if  
19 authorized in writing by an employee, ~~the recognized or certified collective~~  
20 bargaining representative of the employee may file a wage claim under this  
21 subsection on behalf of the employee. The department may receive and investigate  
22 any wage claim which is filed with the department, or received by the department  
23 under s. 109.10 (4), no later than 2 years after the date the wages are due. The  
24 department may, after receiving a wage claim, investigate any wages due from the  
25 employer against whom the claim is filed to any employee during the period

**BILL**

commencing 2 years before the date the claim is filed. The department shall enforce this chapter and ss. 66.0903, 103.02, 103.49, 103.82, 104.12 and 229.8275. In pursuance of this duty, the department may sue the employer on behalf of the employee to collect any wage claim or wage deficiency and ss. 109.03 (6) and 109.11 (2) and (3) shall apply to such actions. Except for actions under s. 109.10, the department may refer such an action to the district attorney of the county in which the violation occurs for prosecution and collection and the district attorney shall commence an action in the circuit court having appropriate jurisdiction. Any number of wage claims or wage deficiencies against the same employer may be joined in a single proceeding, but the court may order separate trials or hearings. In actions that are referred to a district attorney under this subsection, any taxable costs recovered by the district attorney shall be paid into the general fund of the county in which the violation occurs and used by that county to meet its financial responsibility under s. 978.13 (2) (b) for the operation of the office of the district attorney who prosecuted the action.

**SECTION 4.** 109.09 (2) (a) of the statutes is amended to read:

109.09 (2) (a) The department of workforce development, under its authority under sub. (1) to maintain actions for the benefit of employees, ~~or an employee who brings an action under s. 109.03 (5), or the recognized or certified collective bargaining representative of an employee, under its authority under s. 109.03 (5) to maintain actions for the benefit of employees,~~ shall have a lien upon all property of the employer, real or personal, located in this state for the full amount of any wage claim or wage deficiency.

**SECTION 5.** 109.09 (2) (b) 1. of the statutes is amended to read:

**BILL**

1           109.09 (2) (b) 1. A lien under par. (a) upon real property takes effect when the  
2   department of workforce development ~~or~~, employee, or collective bargaining  
3   representative files a notice of the lien with the clerk of the circuit court of the county  
4   in which the services or some part of the services were performed, pays the fee  
5   specified in s. 814.61 (5) to that clerk of circuit court, and serves a copy of that petition  
6   on the employer by personal service in the same manner as a summons is served  
7   under s. 801.11 or by certified mail with a return receipt requested. The clerk of  
8   circuit court shall enter the notice of the lien on the judgment and lien docket kept  
9   under s. 779.07.

10           **SECTION 6.** 109.09 (2) (b) 2. of the statutes is amended to read:

11           109.09 (2) (b) 2. A lien under par. (a) upon personal property takes effect when  
12   the department of workforce development ~~or~~, employee, or collective bargaining  
13   representative files notice of the lien in the same manner, form, and place as  
14   financing statements are filed under subch. V of ch. 409 regarding debtors who are  
15   located in this state, pays the same fee provided in s. 409.525 for filing financing  
16   statements, and serves a copy of the notice on the employer by personal service in the  
17   same manner as a summons is served under s. 801.11 or by certified mail with a  
18   return receipt requested. The department of financial institutions shall place the  
19   notice of the lien in the same file as financing statements are filed under subch. V  
20   of ch. 409.

21           **SECTION 7.** 109.09 (2) (b) 3. of the statutes is amended to read:

22           109.09 (2) (b) 3. The department of workforce development ~~or~~, employee, or  
23   collective bargaining representative must file the notice under subd. 1. or 2. within  
24   2 years after the date on which the wages were due. The notice shall specify the  
25   nature of the claim and the amount claimed, describe the property upon which the

**BILL**

1 claim is made, and state that the person filing the notice claims a lien on that  
2 property.

3 **SECTION 8.** 109.09 (2) (c) 1. of the statutes is repealed.

4 **SECTION 9.** 109.09 (2) (c) 1m. of the statutes is renumbered 109.09 (2) (c) and  
5 amended to read:

6 109.09 (2) (c) A lien under par. (a) takes precedence over the rights of any  
7 purchaser of any property of the employer, including any bona fide purchaser under  
8 11 USC 545 (2), and over all other debts, judgments, decrees, liens, or mortgages  
9 against the employer, except ~~a lien of a commercial lending institution as provided~~  
10 ~~in subd. 2. and 3. or~~ a lien under s. 292.31 (8) (i) or 292.81, regardless of whether those  
11 other debts, judgments, decrees, liens, or mortgages originate before or after the lien  
12 under par. (a) takes effect. A lien under par. (a) may be enforced in the manner  
13 provided in ss. 779.09 to 779.12, 779.20, and 779.21, insofar as those provisions are  
14 applicable. The lien ceases to exist if the department of workforce development ~~or~~  
15 ~~the employee~~ does not bring an action to enforce the lien within the period prescribed  
16 in s. 893.44 for the underlying wage claim.

17 **SECTION 10.** 109.09 (2) (c) 2. of the statutes is repealed.

18 **SECTION 11.** 109.09 (2) (c) 3. of the statutes is repealed.

19 **SECTION 12.** 109.11 (2) (a) of the statutes is amended to read:

20 109.11 (2) (a) In a wage claim action that is commenced by ~~an employee~~ before  
21 the department has completed its investigation under s. 109.09 (1) and its attempts  
22 to compromise and settle the wage claim under sub. (1), a circuit court may order the  
23 employer to pay to the employee, in addition to the amount of wages due and unpaid  
24 and in addition to or in lieu of the criminal penalties specified in sub. (3), increased  
25 wages of not more than 50% of the amount of wages due and unpaid.



# BILL

### **SECTION 13. Nonstatutory provisions.**

(1) WAGE CLAIM LIENS. Notwithstanding section 109.09 (2) (c), 2007 stats., a lien that exists under section 109.09 (2) (a) of the statutes on the day before the effective date of this subsection takes precedence over a lien of a commercial lending institution, as defined in section 109.09 (2) (c) 1., 2007 stats., that originated before the lien under section 109.09 (2) (a) of the statutes took effect.

**(END)**

**Balford, Sarah**

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**From:** Browne, Michael  
**Sent:** Monday, January 05, 2009 9:22 AM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB 09-0882/2 Topic: Wage claim lien priority

Please Jacket LRB 09-0882/2 for the SENATE.